

***United States Court of Appeals
for the Second Circuit***



**PETITION FOR
REHEARING**

ORIGINAL

77-7104

United States Court of Appeals
For the Second Circuit

DAVID E. ROLF,

Plaintiff-Appellant-Cross-Appellee,

against

BLYTH EASTMAN DILLON & CO., INC.
and MICHAEL STOTT,

Defendants-Appellees-Cross-Appellants,

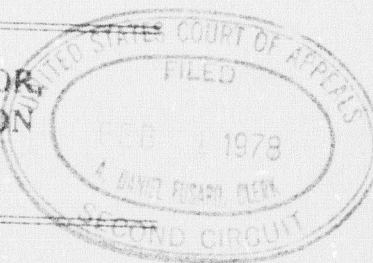
and

AKIYOSHI YAMADA,

Defendant.

Appeal from the United States District Court
for the Southern District of New York

PETITION FOR REHEARING OR,
ALTERNATIVELY, SUGGESTION
FOR REHEARING IN BANC



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UNITED STATES COURT OF APPEALS

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PETITION FOR REHEARING OR, ALTERNATIVELY,
SUGGESTION FOR REHEARING IN BANC

Defendants, Blyth Eastman Dillon & Co. Incorporated ("BEDCO") and Michael Stott ("Stott"), petition the Court for rehearing or, in the alternative, submit this suggestion for rehearing in banc, pursuant to Rules 35 and 40, Federal Rules of Appellate Procedure, of the decision and judgment of the panel of this Court rendered January 3, 1978 (Smith and Oakes, Circuit Judges, with dissent by Mansfield, Circuit Judge).

REASONS FOR GRANTING REHEARING

The majority, taking several steps beyond the Supreme Court in Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1976), has determined that a broker dealer (BEDCO) and its registered representative (Stott) can be liable to a customer (Rolf) under § 10(b) and Rule 10b-5 for "aiding and abetting" the "fraud" of an independent investment advisor (Yamada) with full trading

discretion, in the advisor's acquisition of a portfolio of "unsuitable" securities, by reason of the representative's assurances of confidence in the advisor and his investment decisions, based on the advisor's then excellent reputation.*

Over the vigorous dissent of Judge Mansfield, the majority has established a new "rule of law" in this Circuit that is virtually indistinguishable from that flatly rejected by the Supreme Court in Hochfelder,** even if "recklessness" can constitute scienter under Hochfelder for an aider and abetter claim.*** As stated by Judge Mansfield:

"The majority views Yamada's investment of the account in unsuitable securities as fraud in and of itself and Stott's state of mind as recklessness amounting to a deliberate intent to deceive. All of this is too much for me to accept. The majority not only patches together watered-down notions of fraud and scienter in arriving at a result indistinguishable in any significant respect from that

*The Supreme Court in Hochfelder expressly did not consider "whether civil liability for aiding and abetting is appropriate under the section and the Rule, nor the elements necessary to establish such a cause of action." Id. at 192, n. 7.

Furthermore, in Hochfelder, a case involving an aiding and abetting claim, the Supreme Court expressly held that the scienter required for civil liability under § 10(b) and Rule 10b-5 was an "intent to deceive, manipulate, or defraud" (id. at 192, n. 7; 193) and expressly did not address whether, "in some circumstances", "reckless behavior" could be "sufficient for civil liability under § 10(b) and Rule 10b-5." Id. at 194, n. 12.

**Rolf v. Blyth, Eastman Dillon & Co., Nos. 77-7104, 77-7124, Slip Op. at 909-10 (2d Cir. January 3, 1978; hereinafter "Op."). We respectfully refer the Court to the dissent of Judge Mansfield in its entirety, with whose analysis petitioners agree in full.

***Judge Mansfield found that "...the facts as stated by the majority fail to support a conclusion that Stott participated in any fraud with the scienter required by Hochfelder." Op. at 913.

reversed by the Supreme Court in [Hochfelder], but also overlooks findings below and undisputed evidence that foreclose Rule 10b-5 liability." Id. at 909-10.

This case, like that of Lanza v. Drexel & Co., 479 F.2d 1277 (2d Cir. 1973) (en banc), involves a question of exceptional importance "to the course of evolution of the law," relating to the aider and abetter liability of a broker dealer and its registered representative under § 10(b) and Rule 10b-5. Furthermore, the majority has established a new fraud -- the purchase of "unsuitable" securities -- without establishing any parameters to this potentially boundless liability and without even determining which securities here might be "unsuitable" or, as we submit is required by Abrahamson v. Fleschner,* at what point the acquisition of "unsuitable" securities reaches the level of 10b-5 fraud, due to the "increasing proportion" of portfolio investments in such securities.

In the instant case, the lower court (and the majority) found that Yamada had committed two separate frauds against Rolf: (1) "Yamada was engaged in fraudulent stock manipulations, of which Stott was ignorant" (Op. at 894) (hereinafter Yamada's "concealed fraud") and (2) Yamada's "overall management" of the account was fraudulent, "over and above the specific manipulations of which Stott was unaware" Id.**

The majority expressly recognized Stott was "ignorant" and "unaware" of Yamada's concealed fraud and does not even suggest that Stott was "recklessly" unaware of said

*1977 FED. SEC. L. REP. (CCH) ¶ 95,889 at 91,277 (2d Cir. 1977), reh. en banc granted.

**Emphasis supplied throughout, unless otherwise noted.

fraud. Id. at 894. By the court's own standard, therefore, Stott cannot be liable for aiding and abetting Yamada's concealed fraud.*

Reduced to its essentials, the majority's determination of aider-abetter liability is based upon two findings: (1) the purchase by Yamada of "unsuitable securities" for Rolf in and of itself is a "fraud" under Section 10(b) and Rule 10b-5, and (2) Stott's "assurances of confidence in Yamada and his investment decisions," made with "reckless disregard of whether those assurances were true or false" establish both "scienter" and "substantial assistance".** This unprecedented rule of law, which "places an extraordinary and unconscionable burden on both the advisor and the broker" (id. (dissent) at 921), should not be allowed to stand.

I. THE MAJORITY, HAVING ERRONEOUSLY DETERMINED THAT THE MERE PURCHASE OF "UNSUITABLE" SECURITIES IS "FRAUD," FAILS TO ESTABLISH ANY PARAMETERS TO THIS "FRAUD" OR TO PARTICULARIZE ITS APPLICABILITY IN THIS CASE.

The majority attempts to satisfy the first element of

*Nevertheless, the majority improperly allows considerations of Yamada's concealed fraud to permeate every aspect of the purported "proof" of Stott's aider and abetter liability for Yamada's allegedly fraudulent purchase of "unsuitable" securities. E.g., Op. at 903; Op. (dissent) at 910-11. In addition, the majority implicitly assesses Stott and BEDCO for Yamada's concealed fraud by means of their new damage standard. See discussion at Section III infra.

**The majority's three-pronged standard of liability is based on (1) a securities law violation (the "fraud") by the principal; (2) the secondary party's knowledge of that fraud ("scienter"); and (3) the secondary party's "substantial assistance" to that fraud. Op. at 902-05.

In essence, Rolf decided to "get rich quicker by choosing an aggressive program involving high-risk, OTC stocks in the hope that his adviser would succeed in picking a few big winners, but well aware of the pitfalls that were involved." Op. (dissent) at 915. Given this investment attitude, it is understandable that the character of the securities in Rolf's May, 1969 portfolio changed, inasmuch as "blue chips" could never have achieved Rolf's accelerated goal.*

In the instant case, it would have been impossible for the majority to have determined "on a stock by stock basis" which securities were "unsuitable" simply because there was little, if any, evidence as to the "suitability" of the vast majority of stocks at issue,** and what there as, was hopelessly suspect.*** Furthermore, plaintiff's expert testified that

*Unlike the Stirling period from 1963-1969 where Rolf "would have been happy" with an annual growth rate of 10% (Tr. Op. at 1027), Rolf in 1970 stated that he then expected his account to increase from \$2 million to \$3.5-\$5 million in one year -- an annual growth rate of 75% to 150%. Id. at 1028.

**Of the total of 37 securities purchased by Yamada for Rolf during the period in question, there was absolutely no evidence as to the suitability of 23. Of the twelve stocks which the Trial Court found to be "low quality" or "lowest of the low", one, DASA Corporation, was actually purchased by Rolf himself through another broker, without Yamada's advice or direction. Id. at 1033. Of the 14 stocks which the Trial Court apparently concluded were unsuitable, eight were in fact profitable as a group for Rolf. (See BEDCO's Appellate Brief, pp. 42-45).

***For example, Rolf's expert testified as follows:

"Q I believe you also said if Yamada bought the stock, it was lowest of the low?

"A I said that, yes, about the securities about which I had no statistical information to make judgment by my objective standards." Joint Appendix ("JA") at 331. See JA 334-35, 336-39, 351-52, 358.

aider-abetter liability by holding that Yamada's purchase of certain allegedly "unsuitable" securities is in and of itself "fraud." However, rather than determine which securities were "unsuitable" or when such "unsuitability" rose to the level of "fraud," the majority simply states:

"The district court found, and we see no basis for concluding otherwise, that Yamada's overall management of the account in violation of his fiduciary duties owed by reason of the investment advisory agreement was fraudulent Moreover, Stott and BEDCO in their brief acknowledge that Yamada committed securities fraud*.... There is therefore no reason to analyze Rolf's portfolio on a stock by stock basis to determine which purchase and sales constituted frauds upon Rolf, a more specific and particularized investigation which we might have to undertake if Yamada had merely manipulated two or three stocks without engaging in a more exhaustive and all-encompassing web of fraud." Id. at 903.

As the aforecited statements indicate, the majority in fact is attempting to use Yamada's concealed fraud (i.e., the manipulation of securities discovered months or years after the fact) to bootstrap itself past the critical problems posed above, namely (1) which securities purchased by Yamada for Rolf were "unsuitable" and (2) how many such purchases were necessary to constitute "fraud." As Judge Mansfield noted:

"The majority opinion, making precious little mention of any frauds committed by Yamada, fails completely to describe or analyze the specific fraud or frauds that were furthered by Stott other than to suggest that they were 'Yamada's investment decisions' and his conversion of Dr. Rolf's portfolio into securities that were highly speculative and of very low quality compared with the type of securities that had been there when the account

*BEDCO and Stott did not at trial and do not now accept any determination that Yamada's mere purchase of allegedly "unsuitable" securities in any way constituted "securities fraud" nor that the petitioners knew or "should have known" of Yamada's related or unrelated frauds during the period at issue.

had been managed directly by Mr. Stirling of BEDCO."
Id. (dissent) at 910.

The majority's failure to adequately define "suitability" stems from its failure to consider the evidence on Rolf's investment intent, both before and after Yamada took over. The Trial Court found that even prior to his association with Yamada, Rolf was a sophisticated investor, willing to engage in "aggressive investments," with the ultimate goal of "doubling his equity." Rolf v. Blyth Eastman Dillon & Co., 424 F. Supp. 1021, 1027 (S.D.N.Y. 1977), hereinafter "Tr. Op.".

When Stirling Logan died, Rolf decided he no longer wanted BEDCO (and specifically did not want Stott) to manage his portfolio, and selected instead one of the "new breed" of investment managers, Yamada. Id. The Trial Court found that "Rolf wanted a very aggressive investment program, that 'he was willing to engage in extensive trading in order to 'double his equity'" (id. at 1028), and that he "was interested in special situations, new issues, and aggressive trading." Id. The Trial Court found that Rolf's letter to Yamada in September, 1970 summarized his investment intent at that time:

"As you recall, we started out with roughly \$2,000,000 of Securities which could be used for trading.... It was my impression that we would wind up with 3.5 to 5 million in a year's time." Id.*

*The Trial Court also found it "clear from the evidence that in May 1969, Rolf expected Yamada to take substantial risks for capital gains, but at the same time to preserve the million dollar portfolio..." Id.

If courts will allow such stated "investment goals" as the standard against which to measure "suitability," every investor would happily embrace such an investment program, for any security which failed to appreciate substantially could be per se "unsuitable," and any broker attempting to fulfill such requirements would become the investor's insurer against loss.

his characterization of an individual security as "lowest of the low" did not mean that it was "unsuitable" and acknowledged that even for an "outside passive investor," interested in "reasonable and prudent risks," a portfolio composed of 20% and possibly even 25% of so-called "lowest of the low" securities might be suitable. JA 340-41. On this basis, a portfolio for a very aggressive investor such as Rolf, containing even 14 "low" or "lowest of the low" securities out of 37 different issues, could hardly be deemed "unsuitable," much less constitute a 10b-5 fraud.

II. THE MAJORITY ERRONEOUSLY HELD THAT STOTT'S ASSURANCES OF CONFIDENCE IN YAMADA AND HIS INVESTMENT DECISIONS DEMONSTRATED "RECKLESSNESS" SUFFICIENT FOR "SCIENTER" UNDER HOCHFELDER.

The majority attempts to establish Stott's "scienter" (by way of "recklessness") and "substantial assistance" to Yamada's "fraudulent mismanagement of Rolf's portfolio" (Op. at 904), on the basis of Stott's assurances of confidence in Yamada and his investment decisions in "reckless disregard of whether those assurances were true or false." The fact remains that during the period of the transactions at issue (from May, 1969 through January, 1971), the lower court found that Yamada's reputation was excellent and that he was considered something of a whiz kid, capable of "making mutual funds, hedge funds, and assorted speculative ventures very profitable." Tr. Op. at 1026.

A. The Majority Erred In Ignoring The Trial Court's Findings That The Reputation Of Yamada During The Entire Period At Issue Was Excellent Such That Stott's Voicing Of Confidence In Yamada Was Not "Reckless".

The "son of a wealthy Japanese industrialist", Yamada

attended Harvard Business School and then joined Kuhn Loeb & Co., a "conservative and prestigious" investment banking firm "which generally handled 'triple-A' clients", where he became an officer and was considered to have "expertise in research and 'special situations'". Id. He left Kuhn Loeb in 1969 to form a partnership with a rather dazzling array of business personalities: Keith Funston, former President of the New York Stock Exchange; John Burns, former president of RCA and former chairman of Cities Service; and J. Richardson Dilworth, head of the Rockefeller Brothers Fund. Op. (dissent) at 918; JA 374-75. He was then a "well known investor in securities" who controlled or managed accounts of "close to \$20 million". JA 417-18. In addition to managing three major individual accounts (including Rolf's), Yamada managed an investment partnership, a publicly registered mutual fund, and an offshore fund. JA 420. In fact, the lower court finds no flaw in Yamada's otherwise excellent reputation until sometime after January, 1971. Tr. Op. at 1034.

In the face of all these findings, Stott's "assurances of confidence in Yamada", an acknowledged expert in "special situations" or "speculative ventures", which Yamada had theretofore made "very profitable for his clients" (id. at 1026), cannot possibly constitute "recklessness" or scienter under Hochfelder. Judge Mansfield noted that the majority has "barely [made] out a case of negligence" against Stott. See p. 12 infra.

B. Stott's Conduct Fails To Meet Not Only This Circuit's Standard For Recklessness But Also The Stricter "Scienter" Requirement Which Should Be Imposed For Secondary Or Aider And Abettor Liability.

The courts have recognized that the scienter standard

for secondary -- as opposed to direct -- liability for damages, should be a particularly strict one.* The Fifth Circuit, in an aider and abetter decision prior to Hochfelder, cautioned:

"The scienter requirement scales upward when activity is more remote; therefore, the assistance rendered should be both substantial and knowing. A remote party must not only be aware of his role, but he should also know when and to what degree he is furthering the fraud." Woodward v. Metro Bank of Dallas, 522 F.2d 84, 95 (5th Cir. 1975).

The majority, mis-citing Woodward, erroneously concludes that the Rule 10b-5 situation "most logically subjected to a recklessness standard" is an aider and abetter claim, where a "direct fiduciary duty" is owed the defrauded party. See Op. at 898. On the contrary, if a "recklessness" standard is to be imposed at all, the "most logical" and proper situation is one involving both a primary, not secondary, wrongdoer and a clearly defined, not amorphous, fraud. Cf. Woodward v. Metro Bank of Dallas, supra.

The majority also cites one commentator** for the proposition that a "recklessness" standard should be allowed in the aider and abetter situation here because of the "practical problem of proof." Instead, Professor Ruder concludes:

"Imposition of liability upon defendants utilizing an aiding and abetting theory requires proof that the secondary defendant knew of the illegal act and rendered positive assistance to the wrongdoers". Ruder, 120 U. Pa. L. Rev. 597, 600 (1972). Cf. Woodward v. Metro Bank of Dallas, supra at 95, n. 23.

Ruder characterizes a standard based on a "duty of inquiry" or a "should have known" standard as eliminating the scienter

*In addition to the authorities cited infra on pages 11-12, see Note, 56 Neb. L. Rev. 382, 394, n. 56 (1977).

**Ruder, "Multiple Defendants in Securities Law Fraud Cases: Aiding and Abetting, Conspiracy, in Pari Delicto, Indemnification, and Contribution," 120 U. Pa. L. Rev. 597 (1972).

requirement. Id. at 632. Such a standard for aider and abetter liability would place an intolerable burden on business.

"In most cases, the alleged aider and abettor (or conspirator) will merely be engaging in customary business activities, such as ... completing brokerage transactions ... If each of these parties will be required to investigate the ultimate activities of the party whom he is assisting, a burden may be imposed upon business activities that is too great. Although such a duty might contribute to the protection of investors by creating another level of private investigators, creation of such a duty through use of aiding and abetting or conspiracy concepts should take place only through the sound foundations of judicial precedent in analogous fields or express statutory language." Id.

Furthermore, this Circuit's recent decisions do not support a finding of scienter here, even if scienter can be based upon "recklessness." This Court stated in Abrahamson v. Fleschner, that the secondary party must both have "knowledge of the fraud" and act "in concert" with the investment adviser. Id. at 91,282, n.16. See Op. (dissent) at 912. In Hirsch v. duPont, 553 F.2d 750, 759 (2d Cir. 1977), this Court held that "knowledge of the fraud, and not merely the undisclosed material facts, is indispensable." Here, even assuming that Stott had a personal belief that some securities were "junk", such a belief is a far cry from actual knowledge of Yamada's commission of 10b-5 fraud. See p. 12 infra.

In Lanza v. Drexel, supra, decided long before Hochfelder, this Court determined in banc that to establish scienter by "willful or reckless disregard for the truth", the fiduciary must have "willfully closed his eyes to or turned his back on" the fraud (id. at 1306), a standard that could not be met here. As Judge Mansfield concluded:

"In short, stripped of its conclusory characterization the majority opinion would barely make out a case

of negligence on the part of Stott, much less one of his deliberately shutting his eyes to facts that would have revealed the 'fraud' on Yamada's part." Op. (dissent) at 914. Furthermore, this Court in Lanza suggested a proper inquiry to be whether [Stott] failed to apprise himself of the "facts" where he "could have done so without any extraordinary effort." Id. at 1306, n. 98. The so-called "facts" here -- the "unsuitability" of certain securities purchased by Yamada -- would have been exceedingly difficult to determine. As stated by Judge Mansfield,

"even conceding that Stott believed some or many of Yamada's purchases to be 'junk,' it would have required a considerable investigation for him to determine whether Yamada's widely-recognized reputation for brilliance was unwarranted or whether the ratio of risk to return on Rolf's portfolio as a whole was consonant with the doctor's investment objectives. A failure to perform such an investigation without more does not, after Hochfelder, establish scienter." Op. (dissent) at 914.

The Seventh Circuit, which has yet to "face the difficult task" of defining the elements of "aider and abetter" liability after Hochfelder, has recognized "recklessness" as sufficient to establish scienter for a primary wrongdoer under 10b-5. Sundstrand Corp. v. Sun Chemical Corp., 553 F.2d 1033, 1045 (7th Cir. 1977), cert den. 46 U.S.L.W. 3219 (Oct. 3, 1977). Recklessness as scienter, however, must be "the kind of recklessness that is equivalent to wilful fraud." Id. Not even "inexcusable negligence" will suffice. Id.* Furthermore, the "wrong" must

*Accord: Franke v. Midwestern Oklahoma Dev. Authority, 428 F. Supp. 719 (W.D. Okla. 1976); Sanders v. John Nuveen & Co., 554 F.2d 790, 793 (7th Cir. 1977).

In Sanders, although the court expressly found both that defendant Nuveen's investigation was "deficient" and that "an appropriate investigation would have revealed the issuer's fraud", the court refused to hold Nuveen liable under 10b-5, even under a primary theory of liability, because Nuveen's conduct was not "so highly unreasonable and such an extreme departure from the standards of ordinary care" as to constitute "recklessness" rather than negligence. Id.

be viewed according to the circumstances at the time, not "in the blazing light of hindsight." Id. at 1045, n. 19. As the Seventh Circuit cautioned:

"... the definition of 'reckless behavior' should not be a liberal one lest any discernible distinction between 'scienter' and 'negligence' be obliterated for these purposes. We believe 'reckless' in these circumstances comes closer to being a lesser form of intent than merely a greater degree of ordinary negligence." Sanders v. John Nuveen & Co., supra at 793.

III. THE MAJORITY ERRED IN ENUNCIATING A DAMAGE STANDARD WHEREBY STOTT AND BEDCO CAN BE LIABLE FOR LOSSES ON "SUITABLE" SECURITIES, ON SECURITIES NOT FOUND "UNSUITABLE", AND FOR LOSSES ON TRANSACTIONS WITH WHICH THEY HAD NO CONNECTION

The majority, having found Stott and BEDCO liable for "aiding and abetting" Yamada's purchase of "unsuitable" securities, has erroneously allowed a damage standard whereby Rolf may be allowed to recoup all economic losses, whatever the cause, suffered during the "aiding and abetting" period, above some "average percentage decline in value." Op. at 907-8.

Under this punitive rule of damages, Rolf may recover all losses, realized or unrealized, on any "discrete transaction" occurring between the opening and closing valuation dates (the "aider and abettor" period), even if the security in question was "suitable" or never found to be "unsuitable",* even if the defendants had no connection with its acquisition -- i.e., acquisitions in which Stott "did not execute the transaction, recommend the security, or reassure Rolf with respect to that security" (Op. at 908), and even if the security was

*See pp. 7-8 supra. As noted therein, Rolf's expert testified that a "lowest of the low" characterization does not mean an individual security is unsuitable.

sold in the period at a price in excess of its actual cost to Rolf. See BEDCO's Appellate Brief, Appendix I. Indeed, the majority would hold BEDCO and Stott accountable for losses realized in separate brokerage accounts maintained by Rolf with other broker dealers, so long as Yamada "managed" such accounts.* Id. at n. 23. Such an extraordinary standard imposes liability without fault and effectively establishes an investors' federal welfare program.** Such a result runs counter to the view, as expressed by one court, that "although the law does not favor a wrongdoer, neither does it promote speculative damages at his expense." Myzel v. Fields, 386 F.2d 718, 741 (8th Cir.) cert. denied 390 U.S. 951 (1968).***

We respectfully submit that the damage rule thus promulgated is incompatible with that set forth in Abrahamson, where this Court allowed as damages against a primary wrongdoer only that "part of net losses" which "stems from the portion of those investments inconsistent with defendant's representations", i.e. investments directly and causally related to the fraud found. Losses from unchallenged investments were disallowed.

*A total of nine securities were actually purchased by Yamada for Rolf under separate discretionary trading authorizations at seven other brokerage firms and delivered to BEDCO.

**For example, Rolf sustained a loss on both the purchase and sale of Standard Oil Co. of New Jersey and on the purchase and sale of Reading and Bates (characterized by Rolf's own expert as of "high quality"), transactions occurring between June 19 and August 12, 1969. If this is determined to be part of an "aiding and abetting" period, Stott and BEDCO automatically will become liable for such losses, a result which provides not compensation in damages but a scheme of investor's insurance. Cf. List v. Fashion Park, Inc., 340 F.2d 457, 463 (2d Cir.), cert den. 382 U.S. 811 (1965).

***It has also been noted that though "a defrauding party is not to be excused, neither is he to be punished." Baumel v. Rosen, 412 F.2d 571, 576 (4th Cir. 1969), cert. denied, 369 U.S. 1037 (1970).

Id. at 91,277, 91,281, n.6. Given the foregoing, the damage standard should be redefined and limited to damages incurred by reason of a securities transaction:

(1) which occurred after a point when the proportion of "unsuitable" issues became so large as to be "inconsistent" with Rolf's investment objectives so as to constitute "fraud" and charge defendants with knowledge of such wrongdoing,

(2) which was itself both "unsuitable" and hence fraudulent and

(3) as to which Stott rendered "substantial" assistance. See pp. 6-8, supra.

We appreciate that the application of this standard may exclude the prospect of any award against these defendants, but that is attributable, we suggest, to the lack of factual findings to support the majority's liability decision.

Conclusion

For the reasons stated herein, petitioners respectfully suggest that the Court should rehear the appeal in banc or by its panel and reverse the judgment of the district court and remand with instructions to enter judgment in favor of the defendants BEDCO and Stott, dismissing the action.

Dated: New York, New York
February 1, 1978

Respectfully submitted,

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E. Sherrell Andrews



DAVID E. ROLF,
Plaintiff-Appellant-Cross-Appellee,
-against-
BLYTH, EASTMAN DILLON & CO., INC. and
MICHAEL STOTT,
Defendants-Appellees-Cross-Appellants

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

EDNA G. WATROUS being duly sworn, says: I am employed in the office of Breed, Abbott & Morgan, 1 Chase Manhattan Plaza, New York, New York 10005, attorneys for Blyth, Eastman Dillon & Co. Inc. and Michaelin the above entitled action.
Stott,

On February 1, 1978, I served the annexed PETITION FOR REHEARING AND BRIEF IN SUPPORT by depositing a true copy thereof in a sealed, postpaid envelope at the post office box maintained at 1 Chase Manhattan Plaza, New York, N.Y. 10005, addressed to the following:

Daniel Fusaro, Esq., Chief Clerk, United States Court of Appeals
United States Courthouse, Foley Square, New York, N.Y. 10007

Silverman & Harnes, Esqs., Attorneys for Plaintiff-Appellant-Cross-Appellee, 75 Rockefeller Plaza, New York, New York 10017

Sworn to before me this
1st day of February 1978

NOTARY PUBLIC, State of New York
No. 44-6449300
Qualified in Kings County
Certificate Filed in New York County
Commission Expires March 30, 1978

Edna G. Watrous